United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1149

B
P of S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

BENJAMIN EISENBERG,

Defendant-Appellant

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

MICHAEL WASHOR
Attorney for Defendant-Appellant
16 Court Street
Brooklyn, N.Y. 11241
(212) 875-1292

ARNOLD E. WALLACH
Of Counsel on the Brief

Dick Bailey Printers *Tel (212) 447-5358*

TABLE OF CONTENTS

CASES CITED

STATUTES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

BENJAMIN EISENBERG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

PRELIMINARY STATEMENT:

The appellant BENJAMIN EISENBERG appeals from a judgment of conviction rendered in the United States District Court, Southern District of New York (Judge Milton Pollack) whereby the appellant was convicted after trial following a guilty verdict by the jury on counts 1, 2 and 3 (18 U.S.C. 1623) charging false declarations made before a grand jury and count 5, charging obstruction of justice (18 U.S.C. 1503). As a consequence the appellant was sentenced under each and every count to a jail term of 18 months, all terms to be served concurrently and fined the sum of $1500 under each count aggregating $6,000.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

1. Was there sufficient evidence to support the verdict under each count in that the questions propounded before the grand jury when the appellant appeared there were indefinite and invited the appellant's answers?

2. Could the appellant have been found guilty under 18 U.S.C. 1623 and 1503?

3. Should the appellant have been informed when he appeared before the grand jury that he was a target of the investigation?

4. Did the Court deny the appellant the effective assistance of counsel when at the close of the day of trial it afforded counsel 10 minutes to discuss with his client whether the appellant should testify and gave him an additional 10 minutes to prepare for summation, denying counsel's request to adjourn the matter for the following day?

STATEMENT OF THE CASE AGAINST THE APPELLANT:

Prior to being questioned, the appellant was informed only that there was a grant of immunity and the prosecutor told the appellant what the immunity purported to be (Government's Exhibit 2, 14)*. Government's Exhibit 2 was a complete transcript of the questionning of the appellant before the grand jury and will be referred to herein as Government's Exhibit 2.

---

*This refers to the pagination of the appendix

Next the government called Charles Fink who testified he was a member of the grand jury that the appellant appeared before on May 6, 1975 (15). He administered the oath to the appellant (16). The scope of the grand jury quest was whether the appellant possessed information that he or third parties made loans bearing high interest rates and whether force was used to collect those loans (18).

On cross examination this witness thought that the appellant was a "target" (19).

On re-direct examination and also being questioned by the judge, the witness explained that the expression "target" meant to him that the appellant's name was mentioned by two witnesses (19).

On re-cross examination the witness could not answer questions as to whether the appellant was asked whether he was a "shylock" or "bookmaker" and the witness responded that he could not remember because "it's so long ago" (21, 22).

Kenneth Giel, a special agent was next called by the government to participate in a dialogue with the prosecutor so as to enact the scene, that is the appellant's appearance before the grand jury, and the interrogation of the appellant, as represented by the script of the minutes of that session (Government's Exhibit 2, 22, 24-27).

The intensity of the government's case next was stepped up with the calling of Michael Dubler (27). Dubler was a salesman. He previously met the appellant 3-1/2 years before the trial at a store where he was employed located at 3rd Avenue and 60th Street and called Churchill's (28). The meeting was arranged by a bookmaker called "Bernie", and the occasion was that the witness desired a loan to pay gambling debts (28, 29). The appellant introduced himself as "Benny" (29, 30). The witness explained that he wanted $3,000 but ultimately a loan of $1,000.00 was made because the witness had no collatera. The terms of the loan was $120.00 weekly for ten (10) weeks (32). At the end of that week a third party stating that he was "Benny's" friend came to collect (34).

This witness never knew the third party by name, but asserted it was the appellant's brother (34, 35). After 4 to 5 weeks this witness couldn't pay the loan; he also joined Gambler's Anonymous (35, 36).

Dubler never knew or received the appellant's telephone number, nor did he know where the appellant was located (36). Upon his inability to repay he claimed that the appellant threatened and cursed him (37). The appellant allegedly told him that there would be a penalty (37). He made one further payment (39). Ultimately he settled for payments of $50.00 monthly (41). Furthermore, the appellant never had the witness' telephone numbe . All in all on the $1,000 loan the witness repaid $800.00 (42). He never told the appellant that his name was "Jack", giving the appellant the name "Mike" (43).

On cross examination Dubler related that the appellant never knew his last name, telephone number or home address; that "Bernie" a bookmaker introduced the witness to the appellant. That the witness dealt with other bookmakers (44, 45). Nor did this witness know "Bernie's" last name (46). In transacting the appellant never asked the witness to sign a note or asked to examine his auto license or registration (46). "Bernie" told the appellant that the witness was "okay" (47). The witness admitted that the appellant may have made a loan to him because of "Bernie" (47). The witness admitted that he couldn't recall the approximate date or exact date that the loan was made. He stated that he couldn't recall because the transaction was about 3-1/2 years prior to the trial. Upon being further questioned he stated that the loan could have been made in late 1971 or 1972 (47). Questioned as to the time of the year or the month, the witness stated he thought it was the "fall" (48).

Although the witness was frightened, he never went to the authorities (49, 50). He was in debt to others and ultimately left New York for a period of three (3) months (53, 55). When he returned he never saw the appellant nor did the appellant ever attempt to collect the debt (57).

Dubler's grand jury testimony disclosed that he told the grand jury that the appellant never threatened to shoot him (58). He did tell the grand jury that he had a heated conversation with the appellant but that he couldn't answer because of the lapse of time (59). He also admitted to the grand jury

that when talking to a federal agent he might have exaggerated (60, 61). Questioned again he admitted that he told the grand jury that the appellant never threatened to kill him (63, 64).

The second witness called by the government was Robert Aronowitz (66). This witness gave his penal biography which consisted of being convicted upon his guilty plea of bribery in 1973. The bribery involved an Internal Revenue Service agent. He received an 18 months suspended sentence as a consequence of his conviction (67, 68, 98, 100). He also cooperated with the government and received a sum of $400.00 in March 1971 in connection with his cooperation (69).

He met the appellant eight (8) years prior to trial through one "Phil", (70). The appellant initially called him on the telephone at his place of business at 38th Street in Manhattan. The witness was a garment contractor (69, 70). In that initial conversation he told the appellant that he needed money. A few days later the appellant telephoned him and ultimately came to his office (70-72). There the witness told the appellant he needed $30,000 for his business (73). The appellant told him the cost of the loan would be $600.00 weekly as interest (73, 74). The appellant also told him that the witness didn't have to repay the loan at any fixed time (74). Later the witness met the appellant at 37th or 38th Street and 7th Avenue and there the appellant gave him an envelope which contained the $30,000 (75-77).

A few days after this, the appellant met the witness to have him sign a note which was done at a nearby bank. This was after the first payment (77-79). After another payment of $600.00 the appellant's brother thereafter made the collections over a four (4) year period (80, 81). The witness claimed that all in all he paid over $125,000 on the loan (81). Nevertheless he still owed the principal amount of $30,000, (83).

When the witness defaulted he explained to the appellant that his business was slack (84, 85). Because his business fell off, he thereafter moved to an office at 37th Street in Manhattan (85). At that location, the appellant upon not being paid, demanded the payment and the witness explained that his business was bad (86). The witness and the appellant made a compromise and the payments were reduced to $50-$75 weekly. The appellant accepted this although reluctantly (87, 88).

Questioned further Aronowitz explained that he arranged with the appellant to meet him at a bar or the street to make any payments (88, 89). He did have the appellant's home telephone number and did call him in the past (89, 90). The witness moved a third time to an office on 36th Street. At that place the appellant's brother appeared to collect the payments (90, 91).

About one and one-half years before the trial he closed the third location (91). A year prior to the trial he accidently met the appellant and told him he was planning to go back into

business, telling the appellant that he would contact him (92, 93).

Aronowitz admitted the appellant never called him at his residence (93). However the witness also testified he never used the name "Jack" but did tell the appellant his last name so as to identify himself (93, 94).

He borrowed other monies from the appellant also (94). This was for a dress business in Rockland County. He never repaid those monies to the appellant (95, 96).

On cross examination he admitted that he met the appellant through a bookmaker (96, 105). The $30,000 loan was made in 1967 or approximately 8 years before the trial (97, 100). At the time he bribed an Internal Revenue Service agent he was still paying the loan (98, 100). He never asked the appellant for a copy of the note that he signed and testified to previously on direct examination (101). Nor did he ever engage in any transactions with the appellant prior to the $30,000 loan (102). At the time he got the loan he was buying automobiles every two years (103, 104). He denied wagering with bookmakers (105). He admitted that the appellant never pressured him for any payments (105).

When the $30,000 loan was made to him, there were no other parties present, and similarly when he made payments there were no other parties present except the collector (106, 107). Nor did this witness ever ask for a return of the note even though he paid all in all about $125,000 (107, 109). Arnowitz admitted

that he never told his accountant or attorney about the loan (109). At the time he initially borrowed the $30,000 he had some debts but he couldn't recall the specifics of those debts. He never attempted to get a loan from a bank (110). Nor did the note have a date or a specification of the rate of interest (111, 112). Furthermore, while he was in debt on the initial loan of $30,000, the appellant gave him an additional $7,000 (114). As to this transaction there was no note (114, 115). Nor did the transaction involving $7,000 contain a fixation of interest or a date for the return of that (115, 116). Aronowitz did say that in regard to the $7,000 transaction the appellant asked for an interest in the business. This $7,000 was never repaid (116). When he was interviewed by a federal agent he couldn't remember whether he told that agent that the appellant wanted to settle the debt for $15,000. Furthermore he told the agent that he only borrowed $7,000 from the appellant (118). He couldn't recollect whether he told the FBI that he borrowed $40,000 from the appellant (119). He readily admitted that the appellant never pressured him (120).

POINT I:

THE APPELLANT'S GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT AS TO COUNTS 1, 2 AND 3 CHARGING FALSE DECLARATIONS UNDER 18 U.S.C. 1623:

The indictment in the surviving false declaration counts, numbers 1, 2 and 3, may be reduced to the following. The first count alleged that the appellant said that if the loans were not paid, he forgot about them or let them lapse; that he didn't remember names and that he didn't threaten anybody. As to the issue of date of the loan, the prosecution's witness Dubler could not remember any too well and had a memory lapse (47). As to threats, Aronowitz testified that the defendant never threatened him (120). In his grand jury testimony, Dubler indicated that the appellant never threatened to kill him (63, 64). It is respectfully submitted that this statement before the grand jury was substantive evidence, see Rule 801 (d)(1) of the newly adopted Federal Rules of Evidence; see also U.S. v. DeSisto, 329 F. 2d 929 (Cir. 2d, 1963).

Similarly in regard to the second count, that dealt with a statement by the prosecutor that the defendant "must know their last names". This was not questionning the appellant but conducting a running debate with the appellant. It was an argument. Furthermore, as the recital of facts shows Dubler didn't know "Bernie's" (the bookmaker) last name, (46). Furthermore when the appellant stated that in "his business nobody gives you his last name" Dubler amply confirmed this for Dubler admitted that he never knew the last name of the appellant, his telephone number or his address (45, 46).

Count 3 also alleged among other things, that the appellant couldn't recollect the last name of the person he loaned over $500.00 naming that person by his first name, "Jack".

Section 1623 requires no corroboration. However the pitfalls of a perjury prosecution where the court considers oath against oath in a prosecution for false declarations all that has to be shown is oath against oath.

In regard to the failure of the appellant to recollect it is respectfully submitted there was absolutely no evidence to show that this was a misrepresentation of a state of mind or that he could recollect. See U.S. v. Clizer, 464 F. 2d 121 (Cir. 9th, 1972) Cert. Denied 409 U.S. 1086, 410 U.S. 948. On page 125 the Court stated that one of the counts in the indictment on review had to be dismissed because:

> "...The record contains no direct evidence that Clizer remembered...episode at the time he testified before the grand jury. In fact, there is little, if any circumstantial evidence to show that Clizer must have remembered the incident...The only circumstantial evidence that even tends to show that the incident must have been remembered by Clizer is testimony given by..., an acquaintance of Clizer, and an active participant..., who became a government informer shortly after the occurrence of the fires that was the subject of the grand jury investigation. His testimony represents too slender a reed upon which to rest a conviction..."

It is put that the government's questions or rather colloquy before the grand jury should have been specific, concrete and confronted the defendant with the substance of what Dubler and Aronowitz told the government and should have given the full names of the borrowers to the appellant. The appellant did tell

the grand jury that he loaned money and gave the first names of borrowers. At this phase the government should have specifically asked the appellant about Dubler and Aronowitz, the loans to them, the repayment and also the time or times of the loans.

At the very least the responses of the appellant before the grand jury were technically true.

In Bronston v. U.S., 409 U.S. 352 (1973) the petitioner committed perjury under 18 U.S.C. 1621 in a bankruptcy proceeding. It was held that Section 1621, the perjury statute, was not violated even though the responses were technically true but unresponsive. It was held that the statute was not violated where the answers evidenced an intent to mislead the interrogator. It was stated in part on pages 357 and 358 that:

> "...but we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true."
>
> "...We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert - as every examiner ought to be - to the incongruity of petitioner's unresponsive answer. Under the pressures, intentions of interrogations, it is not uncommon for most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it..."

It was further continued on pages 358-359 that:

> "...If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."
>
> "...A jury should not be permitted to engage in conjecture, whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe his answer to be true'. To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know..."

It was further stated in part on page 360 that:

> "...The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner - so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry..."

The appellant's statements that he couldn't recollect were at most his opinion as to a state of mind, not testimony as to facts. See U.S. v. Esposito, 358 F. Supp. 1032,(D.C.N.D., Ill., 1973) at pages 1033, 1034, the Court stating in part that:

> "The second question did result in an unresponsive answer which was therefore ambiguous. Thus its literal untruthfulness cannot be determined. Since the answer was ambiguous and at most answered a question which had not been asked, the defendant cannot be found guilty of perjury..."
>
> "The third question was propounded in an attempt to resolve the ambiguity but the defendant's answer was evasive: 'I don't believe I have ever seen him there.' This was not a direct answer to the question and is merely a statement of defendant's state of mind."

In U.S. v. Camporeale, 515 F. 2d 184 (Cir. 2d, 1975), this Court held that a prosecutor questioning a person before the grand jury had no duty to divulge to such person any independent proof in relation to the subject matter of the investigation. However, this Court also added at page 189 that:

> "...In any event the prosecutor in the present case acted fairly, advising Camporeale at the outset of his grand jury testimony that his 'activities had been under surveillance for a considerable period of time'."

Examining the testimony in this case and the indictment itself, it is very difficult to find that the appellant lied before the grand jury. In regard to Aronowitz, it is interesting to note that while he testified he got an initial loan of $30,000 and paid over $100,000 it would have been interesting if this "interest" was ever deducted by Aronowitz from his income tax.

The holding in Bronston, supra, is even more applicable to the circumstances of a case such as this. In Bronston, there was a civil proceeding where it can be assumed that Bronston was entitled to be represented by counsel In this case as well as similar cases, the witness or "target" of the grand jury investigation is closeted with the U.S. Attorney in the confines of the grand jury area. Obviously his counsel cannot be present. A statement in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) although placed in a different context, would seem to apply to the "witness" or "target" called before the grand jury even if immunized. That statement at page 55 in part reads as follows:

> "...our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt;..."

It is also suggested that what the prosecutor did in this case was to lay a trap for the appellant so that the ensuing indictment for false declarations could be had. At the very least there should have been a warning to the appellant that he would be liable to be indicted in the light of his testimony which the prosecutor deemed to be untruthful. In U.S. v. Del Toro, 513 F. 2d 656 (Cir. 2d, 1975) at page 665 it was stated in part:

> "Kaufman appeared before the grand jury...He was advised of his privilege against self-incrimination and that he was a target... After he gave what the Assistant U.S. Attorney believed to be perjurious testimony, he was warned that he might be subject to a perjury prosecution and asked whether 'in the light of that warning' he wished to change his testimony..."

POINT II:

THE CONVICTION UNDER 18 U.S.C. 1503 SHOULD BE SET ASIDE BECAUSE THE ACTS ATTRIBUTED TO THE APPELLANT WERE NOT WITHIN THE SCOPE OF THAT SECTION; AND ALTERNATIVELY, BOTH SECTIONS CANNOT CO-EXIST IN THE CONTEXT OF THIS CASE:

Pre-existing 18 U.S.C. 1623 was 18 U.S.C. 1503 the statute underlying the 5th count of the indictment. Appellant advances the argument on the theory that while this Court recognized that 18 U.S.C. 1621 and 1503 were distinct and could support separate findings of guilt, there is still an open question whether the

evasive testimony as to the failure of recollecting as well as the alleged false testimony involved in the false declarations counts, could be the basis for the conviction under the count based on Section 1503. In charging the jury as to the 5th count, the court charged the jury could find the appellant guilty if he gave "false or evasive answers" (193). The trial jury was further instructed that the 5th count would lie if there was a"concealing from a grand jury information which is relevant..." (194).

In U.S. v. Cohen, 452 F. 2d 881 (Cir. 2d, 1971) cert. denied, 405 U.S. 975, the facts disclosed that when the defendant was before the grand jury he was presented with a writing. He stated he knew nothing about this writing. It so happens he gave that writing to a third party, telling the third party the meaning of the writing. This Court held that Section 1503 was violated by the intentional concealment of knowledge. This Court distinguished the acts prohibited by the general perjury statute 18 U.S.C. 1621 . The gravaman of the offense under Section 1503 it was held was the deliberate concealment not falsehood. It was further argued that to allow the prosecution to proceed under Section 1503 would help avoid the corroboration required in the general perjury statute 18 U.S.C. 1621. It is now suggested to this Court that no corroboration is required under Section 1623.

However in U.S. v. Essex, 407 F. 2d 214 (Cir. 6th, 1969) the appellant was convicted for juvenille delinquency based on a violation of Section 1503. Upon appeal it was reversed. The basis of the charge was that the appellant, an infant, filed a perjurious affidavit in court in support of a motion for a new trial in an earlier case. The affidavit alleged thatthe appellant had sexual intercourse with members of the jury in regard to the other case while the jury was sequested. The Court held that Section 1503 was the product of the laws involving contempt and further held that false testimony alone would not constitute contempt without the presence of the additional element of obstructing justice. It was further held that the falsity of the appellant's statements established that there was no obstruction of justice remarking that the appellant was guilty of perjury. On page 218 it was stated in part involving the closing phrase of Section 1503 that:

> "...the general clause at its end, moreover must be read to embrace only acts similar to those mentioned in the preceding specific language... Neither the language of Section 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice. If appellant committed any offense at all, it was the perjury charged in the information against him."

In U.S. Rosner, 352 F. Supp. 915 (D.C.N.Y., 1972), a conflict was noted between the Courts of the Second Circuit and the other Circuits in regard to the purpose and theory underlying the construction of Section 1503, it being noted that the other Courts concluded that Section 1503 is aimed only at activity of an intimidating nature against persons involved in the judicial process.

POINT III:

THE GOVERNMENT ATTORNEY SHOULD HAVE ADVISED THE APPELLANT THAT HE WAS A "TARGET" OF THE GRAND JURY INVESTIGATION:

Charles Fink, the foreman of the grand jury, testified at the trial. Incidentally he couldn't even initially make a courtroom identification of the appellant (16). On cross examination he related that he thought the appellant was a "target" (19). On re-direct examination he explained his answer because the appellant's name was mentioned by two witnesses (19)**.

Government's Exhibit 2, the minutes of the grand jury that the appellant appeared before contained no such warning by the U.S. Attorney who appeared before it. In U.S. v. Jacobs, (Cir. 2d February 24, 1976), slip opinion at page 2111, this Court exercising its supervisory power, required a prosecutor questionning a person before a grand jury to advise that person whether he or she was a target of the investigation. In that case, the defendant was given some warnings as to the right of silence. This Court, not deciding the constitutional issues raised, exercised its supervisory power to require the prosecutor to tell the subject whether the subject was a target of the grand jury investigation.

Nor can it be argued in this case that the grant of immunity

**( )It will be recalled that two witnesses testified against the appellant at trial.

displaced this argument. Firstly, the grand of immunity was based on 18 U.S.C. 6002 and ran only as to the use of the appellant's testimony. See Kastigar v. U.S., 406 U.S. 441 (1972). Following the ruling in Kastigar, it was held that the government has a weighty burden of establishing that a succeeding prosecution involving the grand jury witness as a defendant was not based on immunized testimony. It was held in this Court in Goldberg v. U.S. 472 F. 2d 513 (Cir. 2d, 1973) footnote number 5, concurring opinion of Judge Oakes, at page 516 that:

> "Without endorsing everything said in Note Standards For Exclusion in Immunity Cases... 82 Yale Law Journal, 171, 181-188 (1972) we would think that prosecutors both in their own interests and in fairness to the defendant, would do well to consider the certification of evidence available prior to the compulsion of testimony proposed at page 182..."

Thus while the prosecution may not have been under the duty to disclose what the other two witnesses said about the appellant, the issue still remains that the appellant, if advised he was a "target", could have taken measures to ascertain just what evidence there consisted independently of his testimony so that he could meaningfully ascertain that such prosecution following his testimony, if any, was insulated from his compelled testimony. Telling the appellant that he was a "target" would have avoided the problem this Court had before it in U.S. v. Catalano, 491 F. 2d 868 (Cir. 2d) at page 272. This Court in affirming the conviction noted that the trial court properly conducted a hearing to ascertain whether the accused testimony given at a grand jury proceeding was the basis of the federal prosecution. See also U. S. v. Kurzer, (Cir. 2d, April 14, 1976) Slip Opinion, pages

3219, 3329, 3230; U.S. v. Bianco, Cir. 2d April 8, 1976, page 3099, 3111-3114.

Put another way, advising the appellant whether he was a "target" would have enabled the appellant to ensure that if he were prosecuted by any other agency of the federal government or any state, that such prosecutions were not the product of the appellant's compelled testimony.

POINT IV:

THE COURT SHOULD HAVE GRANTED APPELLANT'S COUNSEL A CONTINUANCE TO THE NEXT DAY FOR THE PURPOSE OF DECIDING WHETHER THE APPELLANT SHOULD TESTIFY OR NOT AND ALSO FOR THE PURPOSE OF PREPARING FOR SUMMATION:

This trial began January 1976, continued and concluded January 9, 1976 (1). On January 9, 1976 counsel apparently asked the Court at thattime for a continuance. The Court stated "it's half a day" (123). The Court further told the defense counsel that the case "started late to accommodate counsel" (123). The appellant's counsel stated that the defense needed time to decide whether the appellant would testify (123). The Court then gave counsel, and of course the appellant, ten minutes to make this crucial decision (123). Shortly thereafter the appellant rested, (124). Nevertheless appellant's counsel asked for the "evening to prepare the summation". The Court denied the request, affording counsel ten minutes to prepare for summation (158). Colloquoy disclosed that the defense counsel also participated in a long enduring trial before Judge Cannella and apparently at the last phase of that case he had to appear before Judge Cannella thus causing his short delay in this case of an hour and a half (125).

Counsel further argued that in regard to this very case he completed all other aspects of the trial in a timely fashion (126). Further that there was no delay in regard to the cross examination because the Court gave the defense counsel one-half hour to read the material furnished under 18 U.S.C. 3500 and that was the first time, the last day of trial (126). The Court concluded this phase of the trial by telling the defense counsel that the day was "young" and then directed the government counsel to sum up first, the defense counsel thereafter to sum up, and then affording the government counsel a brief period for rebuttal (126).

The failure to afford the appellant ample time to exercise his right to present a defense by testifying prejudiced the appellant. The right to testify is fundamental to a fair trial. See Ferguson v. Georgia, 365 U.S. 570. Further, the appellant was confronted with the evidence at trial for the first time. Certainly it was not asking too much for the evening off to deliberate with counsel whether to exercise the important choice of not testifying or testifying, both constitutional rights. See Harris v. New York, 401 U.S. 222, 225.

The denial of the overnight continuance to make this important decision left the appellant within the statement of this Court in U.S. v. Frank, 494 F. 2d 145 (Cir. 2d, 1974) at page 153 where it was stated that:

> "In passing upon the sufficiency of the evidence, the Court had only the prosecution's case, the defense having offered none... But the self-incrimination clause does not elevate a defendant's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for the jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version..."

Realistically, in order for the appellant to have testified, it would have been necessary to evaluate the testimony of the two witnesses who testified against him, analyze their testimony, and be prepared to offer a truthful defense. Affording counsel and his client ten minutes to make this choice, it is suggested, prejudiced the appellant's right to exercise his constitutional right to testify, present a defense and enjoy a fair trial.

It is also contended that the Court should have afforded counsel an overnight continuance to prepare a summation. It is to be noted under the recent practice, the prosecutor has two summations. Counsel for the appellant was engaged simultaneously in the phase of another trial. In effect, counsel was trying two cases simultaneously; this case and his other case. Meanwhile this case involved merely "oath against oath" with the appellant not testifying. It is suggested the right to sum up is a basic due process right as well as a right afforded a defendant in a criminal action under the 6th Amendment to the Federal Constitution. The appellant had a right to effective counsel. The crucial phase of a criminal action is summation. As stated in Herring v. New York, 45 L. Ed. 2d 593, at page 598:

"There can be no doubt the closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial..."

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

MICHAEL WASHOR
Attorney for Defendant-Appellant

ARNOLD E. WALLACH
Of Counsel on the Brief

WASHOR USA v. Eisenberg

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of April 1976 deponent served the within Brief upon:

U.S. Atty., Southern Dist. of NY

attorney(s) for

Appllee

in this action, at

1 St. Andrews Plaza,
New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 30
day of April, 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977